

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PERCY LEVY,

Petitioner,

v.

JEFFREY UTTECHT,

Respondent.

CASE NO. C06-1224JLR  
ORDER

**I. INTRODUCTION**

This matter comes before the court upon a Report and Recommendation (“R&R”) of the Honorable Mary A. Theiler, Magistrate Judge (Dkt. # 35) on Percy Levy’s petition for a writ of habeas corpus under 28 U.S.C. § 2254. Judge Theiler recommends denying Mr. Levy’s petition with prejudice. Having reviewed the R&R, Respondent Jeffrey Uttecht’s objections, and the balance of the record in this case, the court ADOPTS the R&R, with modification as described herein. The court DENIES Mr. Levy’s habeas petition (Dkt. # 6), and DISMISSES this action with prejudice.

**II. BACKGROUND & ANALYSIS**

Mr. Levy, who is proceeding pro se, was convicted by a jury in state court in 2003 on one count of first degree burglary while armed with a deadly weapon, two counts of first degree robbery while armed with a deadly weapon, and one count of second degree

possession of a firearm. He is currently in the custody of the Washington Department of Corrections, serving a term of 330 months. Judge Theiler's R&R provides a thorough background, including the evidence elicited at Mr. Levy's trial, and a procedural history, which the court incorporates by reference. Mr. Levy's habeas petition presents seven grounds for relief. The court adopts without modification Judge Theiler's R&R as to its analysis and dismissal of grounds three through seven. The court modifies the R&R as to grounds one and two as follows.

Mr. Levy's first two grounds for relief challenge the jury instructions provided at trial. In his first ground, Mr. Levy contends that the Washington Supreme Court erred in concluding that certain instructions constituted harmless error rather than analyzing the instructions under a structural error standard. In his second ground, Mr. Levy contends that the jury instructions violated his constitutional rights to trial by jury and due process under the Sixth and Fourteenth Amendments.

In the habeas petition before this court, Mr. Levy does not identify the specific jury instructions underlying the basis of his claims. On direct appeal, however, Mr. Levy specifically challenged jury instructions 10, 15, 16, and 20, by arguing that they contained impermissible judicial comments on the evidence. See Administrative Record ("AR"), Ex. 6 at 5 (Dkt. # 18). Instruction 10 provided:

To convict the defendant of the crime of burglary in the first degree, as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 24th day of October, 2002, the defendant, or an accomplice, entered or remained unlawfully in a building: *to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA;*
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the dwelling or in immediate flight from the dwelling the defendant or an accomplice in the crime charged was armed with a deadly weapon, *to-wit: a .38 revolver or a crowbar; and*
- (4) That the act occurred in the State of Washington

1 If you find from the evidence that each of these elements has been  
2 proved beyond a reasonable doubt, then it will be your duty to return a verdict  
3 of guilty.

4 On the other hand, if after weighing all of the evidence you have a  
5 reasonable doubt as to any one of those elements, then it will be your duty to  
6 return a verdict of not guilty.

7 Id. at 3-4 (emphasis added). Instruction 15 provided:

8 To convict the defendant of the crime of robbery in the first degree  
9 as charged in Count II, each of the following elements of the crime must  
10 be proved beyond a reasonable doubt:

- 11 (1) That on or about the 24th day of October, 2002, the defendant or  
12 an accomplice, unlawfully took personal property, *to wit: jewelry,*  
13 from the person or in the presence of another, *to-wit: Michael*  
14 *Montemayor;*
- 15 (2) That the defendant intended to commit theft of the property;
- 16 (3) That the taking was against Michael Montemayor's will by the  
17 defendant's or an accomplice's, use or threatened use of immediate  
18 force, violence or fear of injury to Michael Montemayor;
- 19 (4) That the force or fear was used by the defendant, or an accomplice,  
20 to obtain or retain possession of the property;
- 21 (5) That in the commission of these acts the defendant or an  
22 accomplice was armed with a deadly weapon, *to wit: a .38 revolver*  
23 *or a crowbar;* and
- 24 (6) That the acts occurred in the State of Washington.

25 If you find from the evidence that each of these elements has been  
26 proved beyond a reasonable doubt as to any one of these elements, then it  
27 will be your duty to return a verdict of not guilty.

28 Id. at 4-5 (emphasis added). Instruction 16 was identical to instruction 15, except that it  
referred to Count III for robbery in the first degree and named as the alleged victim,  
"Brianna Thorne aka April Ames." Id. Instruction 20 provided:

In regard to Counts I, II, III, and IV<sup>1</sup>, it is alleged that the defendant,  
or an accomplice, possessed one or more deadly weapons, *to wit: a .38 revolver*  
*or a crowbar.* To convict the defendant in Counts I, II, III, and IV, the State  
must prove beyond a reasonable doubt that the defendant possessed one or

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<sup>1</sup>Like Counts II and III, Count IV charged robbery in the first degree, except that it  
identified Kenya White as the alleged victim. The jury found Mr. Levy not guilty on Count IV,  
but guilty on the remaining counts. AR, Ex. 6 at 5.

1 more deadly weapons. Further, you must unanimously agree as to which  
 2 deadly weapon or deadly weapons, (*a .38 revolver or a crowbar*), he possessed.  
 [ <sup>2</sup> ]

3 Id. at 5 (emphasis added).

4 Although Mr. Levy did not take exception to any of the court's instructions during  
 5 trial, he challenged the "to-wit" language on direct appeal, arguing that the court's  
 6 references to the apartment address, Kenya White, Michael Montemayor, Brianna  
 7 Thorne, the revolver, the crowbar, and the jewelry, effectively instructed the jury that  
 8 elements of the charged crimes had been established as a matter of law and thereby  
 9 removed those elements from the jury's consideration. Id. at 5-6. The Washington Court  
 10 of Appeals issued a lengthy unpublished opinion concluding that, although some of the  
 11 "to-wit" statements amounted to improper comments on the evidence, any errors were  
 12 harmless. Id. at 5-14.

13 In a petition for review to the Washington Supreme Court, Mr. Levy argued that  
 14 the Court of Appeals' decision was not only in conflict with Washington law, but also the  
 15 United States Constitution. Id., Ex. 11. In an en banc opinion, the Washington Supreme  
 16 Court found that the "to-wit" references to the building and the crowbar qualified as  
 17 improper judicial comments, but that the remaining references did not. Id., Ex. 12 at 12-  
 18 13.<sup>3</sup> Applying Washington law, the Washington Supreme Court presumed that the

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20 <sup>2</sup>As to Counts I, II, and III, the jury found that Mr. Levy was not armed with a crowbar,  
 21 but was armed with a firearm. Id. at 2-5.

22 <sup>3</sup>The Washington Supreme Court concluded that the reference to the revolver did not  
 23 constitute a judicial comment on the evidence because Washington's pattern jury instructions  
 24 permit a court to instruct the jury that a revolver is a deadly weapon as a matter of law. AR, Ex.  
 25 12 at 12. The Court also found that the trial court's references to jewelry as personal property  
 26 were not error because the pattern jury instructions permit an instruction that a particular piece  
 27 of property qualifies as personal property, and in Mr. Levy's case, there was no dispute as to  
 28 whether the jewelry was personal property. Id. at 13. The Court also found that instructions  
 stating the names of victims were not error because a victim's name is not an element of the  
 offense of robbery, and that simply identifying the victim in each charge did not improperly  
 suggest to the jury that it need not find that property was taken from another. Id.

1 judicial comments were prejudicial. Id. at 17.<sup>4</sup> Nonetheless, the Court found that the  
2 State had met its burden in demonstrating that the statements did not prejudice Mr. Levy.  
3 Id. at 20. As to the instruction that the apartment was a building, the Court observed that  
4 this was not a disputed fact; no reasonable juror could conclude that the apartment was  
5 not a building. Id. at 18. With respect to the crowbar, the court noted that the jury might  
6 have erroneously concluded that the crowbar was a deadly weapon as a matter of law;  
7 however, because the jury ultimately found that Mr. Levy possessed the firearm and not  
8 the crowbar during commission of the crimes, he could not have been prejudiced by the  
9 comment. Id. at 19.

10 Judge Theiler recommends dismissing Mr. Levy's habeas petition with respect his  
11 claims concerning the jury instructions on the basis that they are essentially state law  
12 claims, which are noncognizable in a federal habeas proceeding. See R&R at 25 (citing  
13 Lewis v. Jeffers, 497 U.S. 764, 780 (1990), for the proposition that federal habeas relief  
14 does not lie for errors of state law). Judge Theiler characterizes Mr. Levy's claims below  
15 as implicating only state, not federal, constitutional concerns: Mr. Levy's "argument to  
16 the [Washington] Supreme Court that the judicial comments in the jury instructions  
17 constituted structural errors under United States Supreme Court case law, did not convert  
18 the state law claim . . . into a federal constitutional claim." Id.

19 Although the court agrees that grounds one and two of Mr. Levy's habeas petition  
20 should be dismissed, the court declines to adopt the analysis provided by the R&R as the  
21 basis for dismissal. The court concludes that Mr. Levy fairly presented his claims  
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24 <sup>4</sup>The Washington Supreme Court considered and rejected Mr. Levy's argument that,  
25 under federal constitutional law, the judicial comments constituted structural errors requiring  
26 automatic reversal. AR, Ex. 12 at 15-17. The Court likewise rejected the State's argument that  
27 the appropriate standard of review was a harmless error analysis under Neder v. United States,  
28 527 U.S. 1, 8 (1999). Id. The court instead held that under Washington law, judicial comments  
are presumptively prejudicial, thereby placing the burden on the State to show that Mr. Levy  
was not prejudiced. Id. at 17 (citing State v. Lane, 889 P.2d 929 (Wash. 1995)).

1 concerning the jury instructions as federal constitutional claims. At the threshold, there is  
2 no question that Mr. Levy cites to the United States Constitution and numerous federal  
3 cases in support of his argument that the instructions violated his rights of due process  
4 and trial by jury in his federal habeas petition before this court. See Pet. at 21-23. In  
5 order to fairly present, and thus exhaust, a federal claim in state proceedings, a petitioner  
6 must, at a minimum, alert a state court “to the fact that the [petitioner is] asserting claims  
7 under the United States Constitution.” Duncan v. Henry, 513 U.S. 364, 365-66 (1995).  
8 As the Washington Supreme Court expressly acknowledged, Mr. Levy relied on federal  
9 constitutional law in challenging the jury instructions on direct appeal. AR, Ex. 12 at 14  
10 (“Levy argues that judicial comments are . . . structural errors subject to automatic  
11 reversal under Neder [Neder v. U.S., 527 U.S. 1 (1999)].”). Indeed, the second argument  
12 heading in Mr. Levy’s brief to the Washington Supreme Court states, “THE  
13 INSTRUCTIONAL ERRORS ARE STRUCTURAL AND THEREFORE PURSUANT  
14 TO NEDER ARE NOT SUBJECT TO HARMLESS ERROR ANALYSIS.” Id., Ex. 11  
15 at 17. Here, Mr. Levy’s explicit reliance on federal law sufficiently demonstrates the fair  
16 presentation of a federal constitutional claim. See Dye v. Hofbaur, 546 U.S. 1, 6 (2005)  
17 (“This is not an instance where the habeas petitioner failed to ‘apprise the state court of  
18 his claim that the . . . ruling of which he complained was not only a violation of state law,  
19 but denied him [a federal constitutional right].’”) (quoting Duncan 513 U.S. at 366).  
20 Even Respondent concedes that Mr. Levy properly exhausted claims one and two “by  
21 having presented such claims to the Washington Supreme Court as federal constitutional  
22 claims.” Resp’t’s Answer at 10 (Dkt. # 15).

23       Accordingly, the court considers under the Anti-terrorism and Effective Death  
24 Penalty Act (“AEDPA”) whether the state court’s adjudication of these claims was  
25 contrary to, or involved an unreasonable application of, clearly established federal law, as  
26 determined by the United States Supreme Court. See 28 U.S.C. § 2254(d)(1). Applying  
27 these standards to the state’s last reasoned decision, Ylst v. Nunnemaker, 501 U.S. 797,  
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1 802-04 (1991), the court holds that Washington Supreme Court's dismissal of Mr. Levy's  
2 claims was neither contrary to, nor involved an unreasonable application of, federal law.

3 In Neder, the Supreme Court held that an erroneous jury instruction that omits an  
4 element of an offense is subject to a harmless error analysis, and employed the test set  
5 forth in Chapman v. California, 386 U.S. 18 (1967) to determine whether an instructional  
6 error was harmless. Neder, 527 U.S. at 15. The test set forth in Chapman is "[w]hether  
7 it appears beyond a reasonable doubt that the error complained of did not contribute to  
8 the verdict obtained." Chapman, 386 U.S. at 24. The Neder Court held that the trial  
9 court's failure to instruct the jury on the element of materiality of a tax offense did not  
10 contribute to the guilty verdict because materiality went uncontested during trial. Neder  
11 527 U.S. at 16.

12 Mr. Levy argues in these proceedings that the harmless error analysis adopted in  
13 Neder is inapplicable because the instructional error in his trial was structural, warranting  
14 automatic reversal. Mr. Levy presented the same argument on direct appeal. In rejecting  
15 this argument, the Washington Supreme Court noted that "there are qualitative  
16 differences" between structural errors and a trial-type errors, chiefly that a structural error  
17 taints the entire proceedings, whereas trial-type errors do not. See AR, Ex. 12 at 16 n. 3  
18 (observing the "very limited class of [structural] errors," which the United States  
19 Supreme Court has held to warrant automatic reversal, including, a defective reasonable  
20 doubt jury instruction, racial discrimination in grand jury selection, denial of self-  
21 representation, denial of a public trial, denial of counsel, and a biased trial judge). The  
22 Washington Supreme Court upheld Mr. Levy's conviction on the basis that the judicial  
23 comments were not structural error, and that the record affirmatively demonstrated that  
24 no prejudice could have resulted from the instructions at issue.

25 Notwithstanding Mr. Levy's argument to the contrary, the analysis of the  
26 Washington Supreme Court is consistent with Neder. Although the Washington Supreme  
27 Court presumed prejudice from the judicial comments – a more stringent standard than  
28 the Neder harmless error analysis – the Washington Supreme Court's resolution of Mr.

1 Levy's claims was not contrary to, or an unreasonable application of, federal law. First,  
2 even assuming that the challenged instructions constituted error, they are not structural.  
3 The Neder Court held that an "an instruction that omits an element of the offense does  
4 not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for  
5 determining guilt or innocence." Neder, 527 U.S. at 8. Here, the instructions that  
6 allegedly established the existence of certain elements as a matter of law are analogous to  
7 the instructions omitting elements at issue in Neder. Both the comments here and the  
8 omissions in Neder preclude the jury from making findings as to each element of the  
9 offense. Under controlling Supreme Court precedent, such instructional error triggers  
10 harmless error review.

11 The record demonstrates that the challenged comments did not contribute to the  
12 verdict obtained. See Chapman, 386 U.S. at 24. As explained by the Washington  
13 Supreme Court, the record contained no evidence that could lead a rational juror to a  
14 contrary finding with respect to the elements at issue – i.e., that a firearm is a deadly  
15 weapon, that an apartment address is a building, and that jewelry is personal property.  
16 The instruction stating that a crowbar is a deadly weapon could not have been prejudicial  
17 because the jurors found that Mr. Levy did not possess a crowbar during the commission  
18 of the crimes. Finally, with respect to identifying the alleged victims, the Washington  
19 Supreme Court aptly observed that such an instruction did not affect the jury's obligation  
20 to make findings as to each element of the offenses.

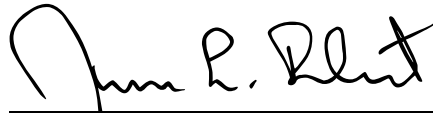
21 Moreover, even if this court were to conclude that the Washington Supreme Court  
22 improperly applied the Neder standard, a conclusion not supported by the record, such a  
23 conclusion would not entitle Mr. Levy to relief in these proceedings. The underlying  
24 issue remains whether the erroneous jury instructions deprived Mr. Levy of his federal  
25 constitutional right to a jury trial under the Sixth Amendment or due process under the  
26 Fourteenth Amendment. The Chapman harmless error standard, which was relied upon  
27 by the Supreme Court in Neder, is the appropriate standard for determining whether an  
28 error is harmless on direct appeal. A less onerous standard, however, is applicable on

1 habeas review. See Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). The standard for  
2 determining whether relief is warranted on federal habeas review is whether any claimed  
3 error “had a substantial and injurious effect or influence in determining the jury’s  
4 verdict.” Id. at 63 (quotation omitted). As evidenced by the R&R’s detailed description  
5 of the evidence adduced during trial, the record amply supports the jury’s verdict.  
6 Considering the entirety of the trial record, the court is satisfied that any erroneous  
7 instructions did not have a “substantial and injurious effect or influence in determining  
8 the jury’s verdict.” Id. Under AEDPA, the court is not at liberty to disrupt the finality of  
9 Mr. Levy’s state court convictions.

### 10 III. CONCLUSION

11 For the foregoing reasons, the court ADOPTS Judge Theiler’s R&R (Dkt. # 35)  
12 with modification as described above. The court DENIES Mr. Levy’s petition for writ of  
13 habeas corpus (Dkt. # 6), and DISMISSES this action with prejudice. The court directs  
14 the clerk to enter judgment consistent with this order, and to send copies of this order to  
15 Mr. Levy, counsel for Respondent, and the Honorable Mary Alice Theiler.

16 Dated this 14th day of August, 2007.

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19 JAMES L. ROBART  
20 United States District Judge  
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